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No. 00-343

Supreme Court, U.S.
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In The

Supreme Court of the United States

WALTER H. ANNENBERG, as SOLE TRUSTEE of the TRUST UNDER WILL of MOSES L. ANNENBERG, WALTER H. ANNENBERG and LEONORE ANNENBERG,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE DECISION BELOW IS FINAL FOR PURPOSES OF 28 U.S.C. § 1257 AND THE FEDERAL ISSUES ARE RIPE FOR REVIEW

The Respondents[1] assert that the instant petition is premature and/or not "ripe" because the local taxing authority has not yet announced backward-looking relief inconsistent with the Due Process Clause of the Fourteenth Amendment. In addition, the Respondent Intervenors contend that absent action by the local taxing authority, the June 1, 2000 judgment of the Supreme Court of Pennsylvania is not "final" for the purposes of review under 28 U.S.C. § 1257(a).

The notion that the Petitioners and this Court should await a decision by the local taxing authority which will clearly violate the Petitioners' due process rights is simply ludicrous especially where the Respondents' submissions make clear that they have no intention of "forthwith" remediating the admittedly "unconstitutional tax regime." (Brief of Respondent Intervenors, p. 6)

The Respondents' positions also ignore the facts in this case. Here, the Supreme Court of Pennsylvania entered a final judgment and relinquished jurisdiction over these cases. (App. 35) While further action by a non-

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[1] Briefs in Opposition were filed by the Respondents Board of Commissioners of the County of Montgomery, *et al.* ("Montgomery County Respondents") and Respondent Intervenors, the County Commissioners' Association of Pennsylvania, *et al.* ("Respondent Intervenors") (collectively referred to as "Respondents").

judicial body is required to effect the judgment of the Supreme Court of Pennsylvania, Petitioners are now "out of court" on their claims. This is especially true with respect to the Supreme Court of Pennsylvania's determination that Pennsylvania's refund statute, 72 P.S. § 5566b, does not apply in this matter.[2] Absent action by this Court, the Supreme Court of Pennsylvania's determination that an unconstitutional tax is one that is "legally collected" – a position which undermines this Court's decision in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) – will be controlling in all suits or appeals by taxpayers challenging the constitutionality of the personal property tax ("PPT") in the Commonwealth of Pennsylvania.[3]

Of course, even if further proceedings remained to be conducted in the state courts, the judgment would not necessarily be rendered non-final for purposes of review. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-86 (1975), this Court described several categories of cases in which an ostensibly non-final decision of a state's highest court will nonetheless be reviewed.

As described by the Court in *Cox*, one such category arises where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had

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[2] As a result of that determination, at a minimum Petitioners have lost the statutory right to recover interest on the unconstitutionally collected taxes. 72 P.S. § 5566b(c)(1). (App. 57-App. 58)

[3] The Petitioners' suit was one of at least 16 suits challenging Montgomery County's collection of the PPT on constitutionality grounds.

because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." 420 U.S. at 478.

In this case, Petitioners' entitlement to meaningful backward-looking relief in the form of an immediate refund meets this *Cox* criterion.

In particular, if *certiorari* is not granted in this case, activities at the local taxing authority level will proceed on the basis of two incorrect federal question determinations: (1) that this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990) requires that the local taxing authority be afforded the opportunity to select a remedy even though any option likely to be chosen will perpetuate the violation of Petitioners' due process rights; and (2) that a tax may be both facially discriminatory and not "compensatory" yet still be **"constitutional."**[4] *See Fulton*, 516 U.S. at 344.

Absent a ruling by this Court on the *McKesson* issue, as amplified by this Court in *Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek, Inc. v. Fla. Dept. of Revenue, et al.*, 522 U.S. 442 (1998), the county taxing authorities can

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[4] Notably, in its first substantive Order in this case, the Supreme Court of Pennsylvania acknowledged that the entire PPT had to be found unconstitutional if the PPT was not a "compensatory" tax. *See* App. 38: "If it is determined that 72 P.S. § 4821 is not a 'compensatory tax,' and that 72 P.S. § 4821 ***is therefore unconstitutional as it violates the Commerce Clause of the United States Constitution,***" the Court of Common Pleas for Montgomery County should determine what is the appropriate remedy. (Emphasis added)

freely and effectively delay remediation of Petitioners' unconstitutional treatment for years.[5] Indeed, the Respondent Intervenors claim that before it can even be determined whether or not retroactive application of the PPT is preferable, "county by county" examinations and analyses of the "new and greatly expanded base of taxable property" will have to be conducted.[6] (Brief of Respondent Intervenors, p. 2) According to the Respondent Intervenors, in the event a taxing authority selects retroactive application of the PPT the counties will then have to undertake for themselves "appropriate rule-making legislative actions" to implement this decision. *Id.* The Respondent Intervenors have threatened to introduce still more administrative impediments to relief for taxpayers by interposing an argument that certain "predeprivation" procedures were not followed.[7] Respondent Intervenors

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[5] Petitioners do not contend that this Court's decisions in *Newsweek* and *Reich* represent a "retreat" from the approach announced in *McKesson*. (Brief of Montgomery County Respondents, p. 12) Petitioners cite *Newsweek* and *Reich* for the proposition that where, as here, a state refund statute exists, that remedy may not be taken away from Petitioners "mid-course." Insofar as no such refund statute was at issue in *W.R. Grace & Co. – Conn. v. Washington, Dept. of Revenue*, 973 P.2d 1011 (Wash.), *cert. denied*, ___ U.S. ___, 120 S. Ct. 371 (1999), the analysis of the Washington Supreme Court in that case is inapposite.

[6] At the beginning of 1996, twenty-eight counties collected the PPT.

[7] Because taxpayers were placed under duress to promptly pay the PPT when due so as to avoid imposition of 6% interest, 72 P.S. § 4881, and a mandatory penalty of up to 10%, 72 P.S. § 5511.10, the "predeprivation" remedy cited by the Respondent Intervenors was inadequate to avoid a due process violation. *See*

invoke the procedure requiring a prompt challenge to any tax assessment provided in 72 P.S. § 4844.1 notwithstanding the Commonwealth Court of Pennsylvania's holding in this case that these procedures need not be followed because the Board of Assessment Appeals is without jurisdiction to determine the constitutional question presented here. *Annenberg, et al. v. The Commonwealth of Pennsylvania, et al.*, 686 A.2d 1380, 1383-84 (Pa. Cmwlth. 1996).

Of course, irrespective of the remedy ultimately afforded these Petitioners, absent review by this Court, the Supreme Court of Pennsylvania's view that the PPT is constitutional – although facially discriminatory and not "compensatory" – will stand. This view not only ignores this Court's *Fulton* opinion but forms the basis for the Supreme Court's inexplicable conclusion that monies collected pursuant to a constitutionally impermissible tax scheme were "legally" collected.[8] Because later review of this federal issue "cannot be had" this Court should

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McKesson, 496 U.S. at 31, 38. *See also Reich*, 513 U.S. at 111: "even assuming the constitutional adequacy of these [predeprivation] procedures . . . no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes." (Emphasis in the original).

[8] Although 72 P.S. § 5566b provides that procedures such as those set forth in 72 P.S. § 4844.1 need not be followed by a taxpayer who presents a claim for refund "of moneys paid under a provision of a statute, ordinance or resolution subsequently held . . . unconstitutional," 72 P.S. § 5566b(b), the Pennsylvania Court's decision improperly deprives taxpayers of that benefit.

exercise jurisdiction over this federal issue now. *Cox*, 420 U.S. at 481.

If review is not granted the question of whether or not an impermissible "bait and switch" has been effected in this case will also go unresolved. Unless this issue is addressed by this Court, Petitioners will be forced to pursue a long and likely unsuccessful attempt to secure the refunds to which they are statutorily entitled under any sensible reading of Pennsylvania's refund statute, 72 P.S. § 5566b(b). *See* Dissenting Opinion, June 1, 2000: "a tax which was unconstitutionally collected is without question one to which the governmental entity was 'not legally entitled'." (App. 33) *See also Reich*, 513 U.S. at 111: the average taxpayer reading a State provision requiring refunds of "any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from [a taxpayer]" would "think it obvious that state taxes assessed in violation of federal law are 'illegally assessed'."

Even if Montgomery County eventually granted a full refund to Petitioners, the decision of the Supreme Court of Pennsylvania would establish bad precedent in the jurisprudence of the Commerce Clause, and should be reviewed – and vacated – now. Such a scenario would satisfy another prong of *Cox* providing that immediate review is appropriate where "the federal issue would be mooted if the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts." 420 U.S. at 478.

II. DUE PROCESS CANNOT BE SATISFIED THROUGH RETROACTIVE APPLICATION OF THE PPT

As set forth in the Petition for Writ of Certiorari, refund is the only remedy which will actually reflect a taxation scheme that does not discriminate against interstate commerce and, therefore, the only remedy of those set forth in *McKesson* which could comport with the Due Process Clause of the Fourteenth Amendment.[9] Specifically, here the taxing authority is precluded from retroactively imposing the personal property tax in order to impose equal burdens on "the former beneficiaries of the discrimination."

Neither Respondent disputes that in *Commonwealth v. Budd Co.*, 108 A.2d 563, 569 (Pa. 1954), *appeal dismissed*, 349 U.S. 935 (1955), the Supreme Court of Pennsylvania held that "a tax may not be retroactively applied beyond the year of the general legislative session immediately preceding that of its enactment; to provide otherwise constitutes a denial of due process." While the Montgomery County Respondents question the vitality of *Budd* in light of a subsequent decision of the lower Commonwealth Court of Pennsylvania in *Garofolo, et al. v. Commonwealth Dept. of Revenue*, 648 A.2d 1329 (Pa. Cmwlth.), *appeal dismissed*, 659 A.2d 561 (Pa. 1994), *Garofolo* reaffirms *Budd's* applicability where the subject matter of taxation has been altered and the taxing authority is

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[9] Accordingly, retroactive imposition of the PPT is hardly "some hypothetical remedy," not ripe for this Court's consideration. *See* Brief of Montgomery County Respondents, p. 10.

attempting to apply the modification retroactively over the larger tax base. 648 A.2d at 1333. Like the provision at issue in *Budd*, the Supreme Court of Pennsylvania's June 1, 2000 Judgment broadens the subject matter of taxation. Respondent Intervenors concede that as a result of this Judgment a "new and greatly expanded base of taxable property" will be reached by the PPT. (Brief of Respondent Intervenors, p. 2) Accordingly, any retroactive application of the PPT remains limited by the Supreme Court of Pennsylvania's holding in *Budd*.

The Respondent Intervenors try to avoid this result by arguing that a Pennsylvania statute, 72 P.S. § 4844, permits the reassessment of taxpayers within five years of when the tax return at issue was or should have been filed.[10] However, by its terms, § 4844 is limited to residents (1) who, although obligated to file a return, fail to file a return or (2) who file a return which either fails to include all property made taxable by the PPT, or which is otherwise "false, incomplete, incorrect or inaccurate." (Respondents Intervenors' App. 1) While the Respondent Intervenors would have this Court believe that the provisions of § 4844 are applicable to individuals heretofore excluded from paying the PPT, 72 P.S. § 4843.1, makes clear that a PPT return need only have been filed by "resident[s] liable to pay [the PPT]." *See also* 72 P.S. § 4841: "***each taxable*** person, . . . shall, respectively, make return annually of the aggregate amount of all the different classes of personal property made taxable by [the

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[10] Because this provision, first enacted in 1913, predates the Supreme Court of Pennsylvania's *Budd* decision, it is unclear how it could alter the vitality of that case.

PPT] . . . " Because individuals excluded from paying the PPT were not required to file a return, and because taxpayers who were required to file returns were only required to report property that was, at the time of filing, subject to tax, § 4844 does not provide a means by which heretofore excluded personal property may be "reached".[11]

Notably, the Montgomery County Respondents ignore the argument that retroactive application of the PPT is unauthorized by any statute, and thus barred. While the Respondent Intervenors argue that *In re Davis*, 37 A.2d 498 (Pa. 1944) and *Schmuck v. Hartman*, 70 A. 1091 (Pa. 1908) have been implicitly overruled by the enactment of statutes permitting reassessments of personal property tax in certain enumerated circumstances not presented here, both decisions remain viable for the proposition that, absent specific statutory authority, no retroactive assessment of personal property tax may be made after the year for which the tax would have been due. This principle of Pennsylvania law plainly precludes retroactive imposition of the PPT to property not previously taxable as an option to satisfy the requirements of *McKesson*.

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[11] The fact that persons not subject to the PPT were not required to file tax returns identifying their "excluded" personal property bolsters Petitioners' argument that retroactive application of the PPT consistent with due process will be practically impossible.

CONCLUSION

For all of the foregoing reasons, Petitioners Walter H. Annenberg, individually and as Sole Trustee of the Trust Under Will of Moses L. Annenberg, and Leonore Annenberg respectfully submit that their petition for writ of certiorari should be granted.

Respectfully submitted,

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